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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1664

ROBERT JOSEPH RENNERT,
Petitioner,

vs.

JACK RAYMOND DUCKWORTH,
Warden, Indiana State Prison,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TABLE OF CONTENTS

Page:

Table of Authorities ii

Opinions Below 1

Jurisdiction 2

Question Presented for Review 2

Statement of the Case 2

I. Nature of the Case 2

II. Course of Proceedings Below 3

Reasons for Disallowance of the Writ 3

I. The Decision Below does not Decide Important Questions of Federal Law which have not been, but should be, Settled by this Court 3

Conclusion 10

TABLE OF AUTHORITIES

Cases: *Page:*

Alexander v. Louisiana, 405 U.S. 625, 92 S.Ct. 1221, 31 L.Ed.2d 536 (1972) 4

Beck v. Washington, 369 U.S. 541, 82 S.Ct. 955, 8 L.Ed.2d 98 (1962) 4

Berard v. Moeykens, 326 A.2d 166 (Vt. 1974) 5

Branzburg v. Hayes, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972) 4

Chance v. Garrison, 537 F.2d 1212 (4th Cir. 1976) 6

Commonwealth v. Brownmiller, 14 A.2d 907 (Pa. 1940).... 5

Cupp v. Naughten, 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973) 6

Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963) 7, 9

Grundler v. North Carolina, 283 F.2d 798 (4th Cir. 1960) 6

Hill v. Johnson, 539 F.2d 439 (5th Cir. 1976) 9

Hurtado v. California, 110 U.S. 516, 4 S.Ct. 111, 28 L.Ed. 232 (1884) 4

Jackson v. State, 157 S.W.2d 921 (Tex. 1942) 5

Latham v. United States, 226 F. 420 (5th Cir. 1915)..... 5

Mendolia v. State, 241 S.W.2d 606 (Tenn. 1951) 5

Paroutian v. United States, 297 F.Supp 137 (E.D. N.Y. 1968) 6

People v. Munson, 150 N.E. 280 (Ill. 1926) 5

Picard v. Connor, 404 U.S. 270, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971) 4

Pierre v. United States, 525 F.2d 933 (5th Cir. 1976) 9

Cases: *Page:*

Rennert v. State, 329 N.E.2d 595 (Ind. 1975) 7

State v. Manney, 133 A.2d 313 (N.J. 1957) 5

Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976) 8

Tollett v. Henderson, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973) 6

Townsend v. Sain, 371 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963) 9

United States v. Braniff Airways, Inc., 428 F.Supp. 579 (W.D.Tex. 1977) 5

United States v. Issacs, 347 F.Supp. 743 (N.D. Ill. 1972) 5

United States v. Manarite, 314 F.Supp. 607, (S.D. N.Y. 1970), *aff'd,* 448 F.2d 583, (2nd Cir. 1971), *cert. denied,* 404 U.S. 947, 92 S.Ct. 281 9

United States ex rel. Maxey v. Morris, 591 F.2d 386, (7th Cir. 1979) 8

United States v. Phillips Petroleum Co., 435 F.Supp. 610 (N.D. Okl. 1977) 5

Walker v. Estelle, 525 F.2d 648 (5th Cir. 1976) 5

OTHER AUTHORITIES:

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2254 5

28 U.S.C. § 2255 5

Rule 6(d), Federal Rules of Criminal Procedure 4, 6

Rule 19, Rules of the Supreme Court of the United States 3, 9

Rule 59(G), Indiana Rules of Trial Procedure 7

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Respondent, Jack Raymond Duckworth, Warden, Indiana State Prison, respectfully prays this Court deny issuance of a writ of certiorari to the United States Court of Appeals for the Seventh Circuit (hereafter Seventh Circuit), thereby refusing to review the decision entered by that Court in cause number 79-1702 on February 1, 1980.

OPINIONS BELOW

The order and memorandum opinion of the United States District Court for the Northern District of Indiana, South

Bend Division (hereafter District Court), cause number S78-229, is unpublished and appears at pages A-11 to A-18 of the Appendix of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit (hereafter Petition). The opinion and judgment of the Seventh Circuit on February 1, 1980, is unpublished and appears at pages A-22 to A-28 of the Appendix of the Petition.

JURISDICTION

Petitioner alleges jurisdiction in this Court pursuant to 28 U.S.C. § 1254(1). The Petition was filed less than 90 days following the order of the Seventh Circuit.

QUESTION PRESENTED FOR REVIEW

1. Whether the Seventh Circuit has decided an important question of federal law which has not been, but should be, settled by this Court.

STATEMENT OF THE CASE

I.

Nature of the Case

The Petition arises from a decision of the Seventh Circuit, affirming an order of the District Court that had denied a writ of habeas corpus. Petitioner alleges that the Seventh Circuit and the District Court erred (1) in not extending to state grand jury proceedings the federal *per se* rule of prejudice when an unauthorized person is present before a federal grand jury and (2) in finding that an alleged First Amendment claim of privacy in personal correspondence does not provide a basis for federal habeas corpus relief.

II.

Course of Proceedings

The petition for writ of habeas corpus was filed by Rennert on October 30, 1978, with the District Court. On November 24, 1978, the State filed its Response to Order to Show Cause. On January 22, 1979, the District Court received the full and complete state court record of Rennert. On January 29, 1979, Rennert filed his Memorandum in Support of Habeas Corpus Petition and in Opposition to Response to Order to Show Cause.

On January 31, 1979, the District Court denied the writ of habeas corpus. Rennert filed his Application for Certificate of Probable Cause with the District Court. On February 16, 1979, Rennert filed his Notice of Appeal. The District Court denied the Application for Certificate of Probable Cause. The Honorable Robert A. Sprecher, Circuit Judge, granted Rennert's request for a Certificate of Probable Cause on June 28, 1979.

The District Court's denial of the writ of habeas corpus was affirmed on February 1, 1980 in an opinion and judgment by Chief Judge Fairchild, and Circuit Judges Bauer and Wood.

REASONS FOR DISALLOWANCE OF THE WRIT

I.

The Decision Below Does Not Decide Important Questions of Federal Law Which Have Not Been, But Should Be, Settled By This Court

In an attempt to comply with Rule 19 of the Rules of this Court, Petitioner contends that the decision of the Seventh Circuit in this case decides important questions of federal

law which have not been, but should be, settled by this Court. Petitioner argues that this Court should elevate the federal *per se* rule of prejudice to all courts, state and federal, in order to protect grand jury suspects from the various dangers that are inherently present when unauthorized persons appear before such secret bodies. Petitioner also argues that violations of First Amendment privacy considerations of a state pre-trial detainee provide the basis for federal habeas corpus relief.

A. The Grand Jury Issue

The Fifth Amendment's guarantee of a grand jury indictment in capital cases has never been incorporated into the Fourteenth Amendment and is not applicable to the states. *Branzburg v. Hayes,* 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972); *Alexander v. Louisiana,* 405 U.S. 625, 92 S.Ct. 1221, 31 L.Ed.2d 536 (1972); *Picard v. Connor,* 404 U.S. 270, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971); *Beck v. Washington,* 369 U.S. 541, 82 S.Ct. 955, 8 L.Ed.2d 98 (1962); *Hurtado v. California,* 110 U.S. 516, 4 S.Ct. 111, 28 L.Ed. 232 (1884). If a state adopts a grand jury system, the constitutional requirements binding the federal government to certain procedures in criminal cases do not apply to the state court proceedings. *Alexander v. Louisiana, supra.*

Petitioner argues that his Fourteenth Amendment rights were violated by the grand jury procedure used to indict him. An eighteen year old suspect was called before the grand jury accompanied by his parents and his attorney. Petitioner argues that the presence of unauthorized persons before a federal grand jury would be governed by Rule 6(d), Federal Rules of Criminal Procedure, authorizing only attorneys for the government, witness under examination, interpreter of a witness, and a court reporter to be

present except during deliberations or voting when they are excluded. The presence of an unauthorized person before a federal grand jury has been often held as ground *per se* for voiding an indictment without any necessity of proof of actual malice. *See, e.g., United States v. Phillips Petroleum Co.,* 435 F.Supp. 610, 618 (N.D. Okl. 1977); *United States v. Braniff Airways, Inc.,* 428 F.Supp. 579, 582-83 (W.D. Tex. 1977); *United States v. Isaacs,* 347 F.Supp. 743, 748-49 (N.D. Ill. 1972); *Latham v. United States,* 226 F.420 (5th Cir. 1915). Petitioner seeks to have this Court impose a similar rule on state grand jury proceedings. Petitioner notes that several states have adopted the federal approach in this area. However, numerous states, in addition to Indiana, have determined that the presence of an unauthorized person in the grand jury room during the investigation of a criminal charge is not sufficient to void an indictment unless it can be shown that the person ultimately indicted was prejudiced or injured in his substantial rights. *See, e.g., People v. Munson,* 150 N.E. 280 (Ill. 1926); *State v. Manney,* 133 A.2d 313 (N.J. 1957); *Commonwealth v. Brownmiller,* 14 A.2d 907 (Pa. 1940); *Mendolia v. State,* 241 S.W.2d 606 (Tenn. 1951); *Jackson v. State,* 157 S.W.2d 921 (Tex. 1942); *Berard v. Moeykens,* 326 A.2d 166 (Vt. 1974).

In *Walker v. Estelle,* 525 F.2d 648 (5th Cir. 1976), a 28 U.S.C. § 2254 petition, the court found that there is no federal constitutional right to a sequestered grand jury proceeding. There, the court reporter was present during the grand jury deliberation, however, no allegation or proof of undue influence was made. The court determined that such conduct did not rise to the level of constitutional proportions. In the context of a 28 U.S.C. § 2255 petition by a federal prisoner, who sought to vacate his federal crim-

inal prosecution because an allegedly unauthorized interpreter was present while certain testimony was being given to the grand jury in violation of Rule 6(d), Federal Rules of Criminal Procedure, the court found that such a defect was not of constitutional dimension. *Paroutian v. United States,* 297 F. Supp. 137 (E.D. N.Y. 1968).

It becomes apparent that Rule 6(d), Federal Rules of Criminal Procedure is not rooted in constitutional law. The question whether an unauthorized person who appears before a state grand jury voids the indictment without a showing of actual prejudice is a matter of state law not involving constitutional issues. Matters of state law not involving federal constitutional issues are not appropriate grounds for federal habeas corpus relief. *Grundler v. North Carolina,* 283 F.2d 798 (4th Cir. 1960); *Chance v. Garrison,* 537 F.2d 1212 (4th Cir. 1976); *see, Cupp v. Naughten,* 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973); *Tollett v. Henderson,* 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973).

B. The Intercepted Letter Issue

While in custody awaiting grand jury action, the Petitioner wrote a letter to the editor of his home town newspaper, placed it in an unsealed envelope and delivered it to jail authorities for inspection for contraband and mailing. After a jail official read the letter without permission of Petitioner and noted incriminating statements about the two murders, the letter was confiscated. When the letter was offered by the State at trial, Petitioner's counsel objected only on the basis of violations of the Fifth, Ninth and Fourteenth Amendments. Petitioner's Motion to Correct Errors sought correction based upon his rights "under

the Constitution of the United States." *Rennert v. State,* 329 N.E.2d 595, 598 (Ind. 1975). Petitioner urged in his direct state court appeal that the reading and confiscation of the letter was violative of the First and Fourteenth Amendments and was an illegal seizure of evidence. *Rennert, supra,* at 598. The Indiana Supreme Court found that no Fourth Amendment claim was presented at Petitioner's trial or in his Motion to Correct Errors and was not considered on appeal. The Indiana Supreme Court treated Petitioner's First Amendment claim in a like fashion. In its treating Petitioner's Fifth, Ninth and Fourteenth Amendment claims, the Indiana Supreme Court found that, in the absence of elaboration or further explanation of this claim in Petitioner's brief and the fact that the United States Constitution does not explicitly mention a right of privacy, each of those amendments have had various aspects of privacy ascribed to them, that they believed that there was no unjustifiable infringement of Petitioner's right to privacy as that right is grounded in the Fifth, Ninth and Fourteenth Amendments and found that the letter was properly admitted.

Petitioner did not present any First or Fourth Amendment claims at trial nor in his Motion to Correct Errors, which is a procedural condition to appeal. Rule 59(G), Indiana Rules of Trial Procedure. Therefore, the Indiana Supreme Court was correct in not considering these claims on appeal. In *Fay v. Noia,* 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963), this Court held that a federal habeas corpus judge may deny relief to an applicant who has deliberately bypassed the orderly state court procedures for reviewing his constitutional claim. The Indiana Supreme Court did not entertain Petitioner's First and Fourth Amendment claims on the merits. Therefore, the

federal courts do not have the discretion to grant the applicant habeas corpus relief to which is otherwise not entitled.

Petitioner argues that he did not have a full and fair opportunity to litigate the Fourth Amendment issue in the state court. Petitioner asserts that the introduction of the intercepted letter was a surprise to his defense counsel and that he hurriedly tossed up three appropriate amendments. The objection was denied. Petitioner asserts that if he would have raised a Fourth Amendment claim it would likewise have been denied. Petitioner submits that this did not afford him with a full and fair opportunity as contemplated by *Stone v. Powell,* 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). However, Petitioner fails to recognize the fact that there was a complete failure to comply with state court procedures for reviewing his constitutional claim. Petitioner did not raise a Fourth Amendment claim at his trial nor in his post-trial Motion to Correct Errors. This failure to do so does not convert the issue into one for federal habeas corpus relief. *United States ex rel. Maxey v. Morris,* 591 F.2d 386 (7th Cir. 1979). Petitioner's Fourth Amendment claim is resolved against him by *Stone v. Powell, supra.*

Petitioner erroneously asserts that the Seventh Circuit extended the teachings of *Stone v. Powell, supra,* to include First Amendment claims. A fair reading of its decision discloses that Petitioner's First Amendment claim was not decided upon the basis of *Stone v. Powell, supra,* but rather that that claim was found not to be justiciable in federal habeas corpus.

Petitioner recognizes that he failed to raise his First Amendment claim at trial and in his post-trial Motion to Correct Errors. By not preserving this issue for appeal,

the Indiana Supreme Court did not consider it. As aforementioned with regard to Petitioner's Fourth Amendment claim, *Fay v. Noia, supra,* teaches that where an applicant has bypassed the orderly state court procedures for reviewing constitutional claims, federal habeas relief is unavailable.

As a general principle, questions unrelated to the cause of detention are not reviewable in federal habeas corpus. Its sole function is to grant relief from unlawful imprisonment or custody and it cannot be used properly for any other purpose. It cannot be used as a springboard to adjudicate matters foreign to the question of the legality of custody. *Pierre v. United States,* 525 F.2d 933 (5th Cir. 1976). The constitutional violation must relate to the underlying conviction. Federal habeas corpus cannot address any alleged civil rights deprivations not related to confinement. *Townsend v. Sain,* 371 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963); *Hill v. Johnson,* 539 F.2d 439 (5th Cir. 1976).

The only case Petitioner cites to this Court supporting his contention that a violation of the First Amendment is justiciable in federal habeas corpus is *United States v. Manarite,* 314 F.Supp. 607 (S.D. N.Y. 1970), *aff'd.* 448 F.2d 583 (2nd Cir. 1971), *cert. denied,* 404 U.S. 947, 92 S.Ct. 281, 285, 287, 298. Petitioner correctly quotes the District Court's opinion in that it does not hold that a violation of the First Amendment results in the suppression of the material, but rather return of the material. While the First Amendment may be grounds for the return of seized pornographic material, a violation of this amendment is not cognizable in federal habeas corpus. This is not the type of case that need be reviewed by this Court under the considerations set out in Rule 19.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari to review the judgment and order of the Seventh Circuit should be denied.

Respectfully submitted,

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